No. 06-891

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TIMOTHY MOON,

Petitioner,

v.

HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS' COMPENSATION FUND, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, AND DR. ASIT RAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

MAY AN EMPLOYEE WHOSE WORKER'S COMPENSATION BENEFITS HAVE BEEN TERMINATED, AFTER AN EVIDENTIARY HEARING BEFORE THE STATE AGENCY RESPONSIBLE FOR DETERMINING ENTITLEMENT TO SUCH BENEFITS, MAINTAIN A RICO ACTION ON THE BASIS THAT ONE OF THE MEDICAL WITNESSES WHOSE OPINIONS SUPPORTED THE CONCLUSION THAT THE WORKER WAS NO LONGER DISABLED ISSUED A FRAUDULENT MEDICAL OPINION?

CORPORATE DISCLOSURE STATEMENT

Respondent, Harrison Piping Supply, has no parent corporation and no publicly held company owns 10% or more of its stock. The Michigan Tooling Association Service Company ceased to exist by January 1, 2003 and its claim administrative functions were assumed by the Michigan Tooling Association Workers' Compensation Fund.

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COUNTERSTATEMENT OF FACTS

Petitioner's "Statement of the Case" consists of argument rather than a recitation of facts. The following facts are relevant to this case and the petition.

Petitioner was an employee of Respondent Harrison Piping Supply ("Harrison"), a member of the Michigan Tooling Association Workers' Compensation Fund ("Fund"). The Fund is composed of some 480 member companies that self-insure their workers' compensation exposure as permitted by Michigan law. The Michigan Tooling Association Service Company ("Service Company") had been the claims administrator for the Fund's workers' compensation claims, but it had ceased to exist by January 1, 2003 and its claim administrative functions were assumed by the Fund on that date. The Fund, not the Service Company, administered Petitioner's claim during the relevant time period.

Petitioner had been injured in the course of his employment at Harrison. Harrison filed the documents necessary to obtain a review of his status and determine if he continued to be disabled from work. After a hearing, Petitioner's worker's compensation benefits were terminated by a magistrate of the Michigan Worker's Compensation Bureau. The worker's compensation magistrate determined, after a hearing and review of six medical reports as well as supporting sworn deposition testimony, that Petitioner was no longer disabled from work. Petitioner sued, claiming that the denial was the result of a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*

The worker's compensation magistrate's opinion was 32 pages long and contained a detailed recitation and analysis of the medical and other evidence, concluding that Petitioner was no longer disabled from work. Petitioner claims that there was a pattern of racketeering activity consisting of five acts, which Petitioner alleged were fraudulent. Three of the allegedly fraudulent acts consisted of mailing a "Notice of Dispute," which, under the provisions of the Michigan Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws 418.101 *et seq.*, raised the issue whether Plaintiff continued to be disabled, required that he be examined by respondent Dr. Ray, and led to the proceeding before the worker's compensation magistrate. Petitioner claims that these Notices of Dispute were fraudulent because they falsely alleged that Petitioner was no longer disabled.

The fourth and fifth allegations of fraud relate to the report prepared by Dr. Ray, who found that Petitioner was no longer disabled. Petitioner alleges that Dr. Ray's opinion was fraudulent. The fourth alleged predicate act was Dr. Ray's mailing of the report with the "fraudulent opinion" to Defendant's attorney, and the fifth was the mailing of that report to Petitioner's attorney.

In chronological order the five allegedly fraudulent acts are:

1. July 24, 2003: Fund mailed a Notice of Dispute.

2. March 25, 2004: Fund mailed a notice, under the WDCA, that Plaintiff was required to be examined by a physician, Respondent Doctor Ray.

3. Between April 8 and April 26, 2004: Dr. Ray mailed his report of the examination that he performed on April 8.

4. April 16, 2004: Fund mailed a Notice of Dispute, which initiated the procedure that culminated in the Worker's Compensation Magistrate's finding on February 25, 2005 that Plaintiff was not entitled to benefits.

5. April 26, 2004: Defendant's attorney mailed Dr. Ray's report to Plaintiff's attorney.

After a hearing, the worker's compensation magistrate, in his 32-page opinion, found that Petitioner had suffered a work-related injury, but that the disability had terminated by the time of his examination by Respondent Dr. Ray. In the opinion, the worker's compensation magistrate provided several reasons for preferring Dr. Ray's opinion over the opinion of Plaintiff's physician, Dr. Smith. First, unlike Dr. Smith, an internist, Dr. Ray is "a board-certified physical medicine and rehabilitation specialist, precisely the specialty in medicine that does diagnose and treat such injuries," *i.e.*, the injuries at issue in this case. Second, Dr. Smith's testimony "failed to give a logical reason for his switching diagnoses (from 'herniated disc' to 'thoracic strain' to 'lumbago,' then back to 'herniated disc')." Third, Dr. Smith "arbitrarily changed the long-standing restrictions he had previously placed upon Plaintiff (of a 40 lb. lifting limit) to a 15 lb. limit without any explanation in the testimony or justification in his notes."

The decision of the magistrate was affirmed by the Worker's Compensation Appellate Commission. Under

Michigan law, a further appeal to the Michigan Court of Appeals was permitted by leave, and thereafter to the Michigan Supreme Court by leave. Petitioner did not seek leave to appeal.

Plaintiff filed this RICO action before the worker's compensation magistrate had issued his opinion. At the hearing on the motions to dismiss, Petitioner conceded that Michigan Tooling Association Service Company was no longer in existence as of January 1, 2003 and that its claim administration functions had been assumed by Respondent Michigan Tooling Association Workers' Compensation Fund.

The district court granted Respondents' motions to dismiss and Petitioner appealed to the Sixth Circuit. The Sixth Circuit affirmed dismissal of the RICO claim. It reversed the district court's dismissal with prejudice of the pendent claim for intentional infliction of emotional distress and remanded for dismissal without prejudice.

The Sixth Circuit ruled that Petitioner had not established the required element of continuity because the decision of the Bureau "is binding on all parties and, if favorable to Moon, would prevent the Defendants from withdrawing the benefits in the absence of further action by the Bureau." 465 F.3d at 727.

After the district court dismissed Petitioner's claims, Defendants moved for the imposition of sanctions under 28 U.S.C. § 1927. The motion was referred to the magistrate judge, who granted the motion and awarded costs. Plaintiff appealed the award of costs to the district court and that issue has not yet been resolved.

REASONS FOR DENYING THE PETITION

I. THERE CAN BE NO PATTERN OF RACKETEERING WHERE THE CLAIM FOR WORKER'S COMPENSATION BENEFITS IS SUBJECT TO FINAL ADJUDICATION BY THE STATE AGENCY EMPOWERED TO RESOLVE DISPUTES CONCERNING ENTITLEMENT TO BENEFITS.

To establish a claim under RICO, 18 U.S.C. § 1961 *et seq.*, a plaintiff must establish that the defendant engaged in (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. "Racketeering activity" is defined to include several predicate acts, one of which is mail fraud. 18 U.S.C. § 1961(1)(b). The pattern of activity must consist of at least two acts within a 10 year period. 18 U.S.C. § 1961(5).

In this case, even if it is assumed that Petitioner has actually alleged acts of fraud, the required pattern of racketeering is missing because the facts do not demonstrate the required continuity.

Petitioner argues that he demonstrated both open and closed-ended continuity, and that the definition of closed-ended continuity requires further development by this Court. Even if such development were needed, this case does not provide a vehicle for such development. The alleged fraudulent acts in this case occurred entirely within a state court adjudicative proceeding and therefore, as is discussed below, applying RICO would violate the principles of the *Burford* abstention doctrine (part II, below), especially where

the acts alleged to be fraud are in fact merely the assertion of a disputed position, and the offering of evidence to support that position (part III).

As the Sixth Circuit observed, the fact that the alleged predicate acts in this case all took place within a single transaction – the dispute over Petitioner's entitlement to continued worker's compensation benefits – by itself prevents any form of continuity, either open or closed-ended. All of the alleged predicate acts could lead only to a final resolution in the state Bureau's hearing and appellate levels and, if Petitioner had chosen to appeal, in the state courts.

Petitioner argues, however, that the Sixth Circuit ignored certain parts of his complaint, which he says allege continuity by suggesting that Defendants may have committed similar acts as to other unnamed employees, *i.e.*, disputing entitlement to benefits and obtaining evidence to support their assertion. Specifically, Petitioner states at page 15 that "[t]he Court of Appeals ignored the allegations of paragraphs 9f, 15 and 16 of the First Amended Complaint that *other claimants* had been defrauded . . . ." (italics in original).

Petitioner misstates the facts. The opinion below quotes text from paragraph 9f and from paragraph 15. 465 F.3d at 727. Having quoted the language that Petitioner claimed the court ignored, the Sixth Circuit went on to analyze whether it met the test of continuity. The opinion discusses this Court's opinion in *H.J., Inc. v. Northwestern Bell Telephone Company,* 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). *H.J., Inc.* states that "the threat of continuity may be established by showing that the predicate acts or offenses are part of an entity's regular way of doing business." *Id.*, 242 U.S. at 242.

If that test is applied to the allegations of Petitioner's complaint, they fall short of alleging any facts that establish continuity. In Paragraph 9f, Petitioner alleged that "defendants and their attorney had relied on [Dr. Ray] in the past to issue 'cut off' reports." This is nowhere near an allegation that using Dr. Ray to issue "cut off" reports was a regular part of the business of any of the Defendants. It is merely an allegation – and a conclusory one at that – about alleged past events, with no allegation of quantity or frequency sufficient to permit an inference that this was a "regular way of doing business." *H.J., Inc.* at 242.

The same is true of paragraph 15, where Petitioner alleged that "[o]n information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their worker's compensation benefits." This allegation, also conclusory and unsupported by any concrete factual allegations, is also at best a statement that something similar may have occurred one or more times in the past. Petitioner did not allege that this was a regular way of doing business, nor did he allege facts that would support such an inference.

II. BECAUSE PROCEEDINGS UNDER MICHIGAN'S WORKER'S DISABILITY COMPENSATION ACT ARE JUDICIAL IN NATURE, AND INCLUDE APPEALS TO THE CIVIL COURTS FROM THE AGENCY DECISION, ABSTENTION UNDER *BURFORD* IS REQUIRED.

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), this Court adopted a policy of deference to state adjudicative processes. In *Burford*, that agency was the Texas Railroad Commission. This Court said:

> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 333-334, 63 S.Ct. at 1107 (citation omitted).

Michigan's worker's compensation scheme has a similar judicial component. The process itself at the trial level, is conducted before and resolved by the magistrate. From the magistrate's decision, an appeal of right can be taken to the Worker's Compensation Appellate Commission. Mich. Comp. Laws 418.859a.

Allowing any RICO claim to be raised where it relates to a state administrative proceeding would inevitably be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." This is the point the trial court made in its amended opinion and order (pp. 11-12), in reference to the *Burford* doctrine, when it stated:

> Indeed, the frequent resolution, in a federal forum, of a plaintiff's entitlement to worker's

> compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCA.

In part, this springs from the inherent uncertainty that would arise in any WDCA proceeding if the parties and the agency knew that there was a parallel action proceeding in federal court. One result in the federal action would make the WDCA proceeding pointless, while the other would allow it some vitality.

On a more practical level, there is also the fact that the remedies are inconsistent. RICO provides for a single, lump-sum damage award, which is to be trebled. This is fundamentally inconsistent both with the mechanism and the purpose of the worker's compensation scheme. Worker compensation is built upon the premise that the mechanism of compensation is to be periodic payments to replace wage loss. A lump sum award, whether trebled or not, is inconsistent with that purpose. The mechanism reflects the fundamental purpose of the compensation scheme, which is compensation for wage loss, not punishment for wrongdoing.

This case presents a textbook example of why *Burford* should be respected and applied. Here, the State agency that had *exclusive* jurisdiction to resolve such questions determined that Petitioner was not disabled subsequent to April 8, 2004. That decision was appealed as of right and affirmed by the Worker's Compensation Appellate Commission. Petitioner could have sought leave to appeal to the Michigan Court of Appeals, and thereafter to the Michigan Supreme Court, but chose not to do so. The determination is final under State law. Petitioner now asks

that this Court permit the application of RICO to overrule that final disposition. If this were permitted, the Michigan worker's compensation system would be reduce to a shambles. Every case lost in that forum would then be subject to federal court RICO scrutiny on the unsupported and oxymoronic allegation that a witness gave a "fraudulent opinion," and that this violated RICO because the opinion, as required by State law, was mailed.

These inconsistencies would lead to a severe disruption in the state proceedings. A WDCA magistrate faced with a parallel federal proceeding might be tempted to consider whether to proceed, on the premise that his or her decision might ultimately be valid, or defer to the federal court, so as to learn whether the efforts would be wasted. That at least would be a sensible approach, but the entire worker's compensation scheme is built on procedures that compel the handling of claims so that benefits are made available on a timely basis. A WDCA magistrate does not have the discretion to hold a proceeding in abeyance.

III. PLAINTIFF HAS NOT ALLEGED PREDICATE ACTS OF FRAUD.

To meet the requirement of a predicate act, Plaintiff relies on allegations of fraud. Plaintiff alleges five fraudulent acts. Three of them consist of the mailing by the Fund of a "Notice of Dispute," which, under the provisions of the WDCA, raised the issue whether Plaintiff continued to be disabled, required that he be examined by Dr. Ray, and led to the proceeding before the Worker's Compensation Agency magistrate. Another is the mailing by Dr. Ray of his report of his physical examination of Plaintiff. The fifth allegation

of fraud is the mailing of Dr. Ray's report by Defendant's attorney.

The first three allegations of fraud are merely allegations that the Defendants followed the procedures specified in the WDCA for raising and resolving a disputed issue of fact. Where there is a dispute over the worker's entitlement to continuing benefits, it is to be determined by the bureau. "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau . . . ." Mich. Comp. Laws 418.841(1). Disputes must be submitted in writing: "[U]pon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing . . . ." Mich. Comp. Laws 418.847(1).

The fourth and fifth allegations are the mailing of a medical opinion. Fraud requires a statement of fact, not an expression of an opinion. In a RICO case, the plaintiff must plead "a material *misrepresentation of fact* that was calculated or intended to deceive persons of reasonable prudence and comprehension." *VanDenBroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (emphasis added). Plaintiff's claim of fraud is based on the opinion of Dr. Ray, which Plaintiff asserts is "fraudulent." At the hearing on the motions to dismiss, Plaintiff's counsel asserted that "[t]he fraudulent statement is the *opinion* that plaintiff is able to work." (emphasis added). It is oxymoronic to speak of a fraudulent opinion.

Dr. Ray's report consists of five pages of factual detail, after which the doctor states his medical opinion. To show fraud, the Plaintiff would have to show that Dr. Ray

knowingly misstated a *fact* within his report. For example, Dr. Ray's report summarizes the findings of a previous MRI. If Dr. Ray had intentionally misstated the results of that MRI, or denied its existence, or invented another report and used that misstatement of *fact* as the basis for an opinion, then a claim of fraud might be stated. But Plaintiff makes no such claim. It is Dr. Ray's medical opinion that Plaintiff describes as fraudulent, not the statements of fact on which that medical opinion is based.

Pursuant to Rule 15.2, the following misstatements of fact in the petition must be addressed. At page 16, Petitioner states that he "was not permitted . . . discover[y]" on the issue of fraud. "He cannot subpoena records .. . He cannot take depositions." The WDCA states that the Bureau "shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute." Mich. Comp. Laws 418.853. Michigan's Supreme Court has held that the Bureau's power "is broad enough to require the answering of interrogatories," *Boggetta v. Burroughs Corporation,* 368 Mich. 600, 603, 118 N.W.2d 980, 981-982 (1962). Petitioner quotes (petition p. 16) a sentence fragment from *Stokes v. DaimlerChrysler,* __ Mich. App. __, __ N.W.2d __ (2006) to the effect that discovery in worker's compensation cases is not derived from the same source as discovery in the trial courts. That is correct, but in that opinion, Michigan's Court of Appeals also noted that the statutes "gave the worker's compensation magistrate power to grant discovery when necessary," and the Court of Appeals further noted that the Michigan Supreme Court, when it considered an application for leave in *Stokes,* had stated that '*Boggetta* . . . . 'remains controlling authority.'" *Stokes v. DaimlerChrysler,* 475 Mich. 875, 714 N.W.2d 347 (2006).

Moreover, in this case plaintiff deposed Dr. Ray and questioned him at length concerning his alleged financial bias, which Petitioner claims is the factual support for the allegedly "fraudulent opinion." There is no mechanism available to Petitioner in a RICO claim that is not provided under state law and process.

Petitioner argues that he was entitled to the application of a "relaxed" standard to his fraud allegations, so that he might show that the same "fraudulent opinions" were given by Dr. Ray or others "to defraud other persons of their worker's compensation benefits (petition, p. 21). This is incorrect for three reasons.

First, Petitioner's allegations of fraud in this case fall short of any actionable standard, and making the same allegations for other claimants does not bring about a qualitative change.

Second, in this case Petitioner deposed Dr. Ray extensively about his alleged financial bias arising from his work in other cases, but Petitioner did not use any of that information to plead fraud with particularity or to establish an alleged pattern; Petitioner's proffered proofs were still conclusory and limited to this case.

Third, Petitioner has always had the ability simply to canvass his colleagues to gather information about other allegedly fraudulent opinions by Dr. Ray. At the hearing in the trial court, he claimed to have this information, but declined to disclose it. Counsel for Petitioner there stated: "I don't want to name names, but other highly respected plaintiff attorneys in the work comp business have said, yes,

this is a cut off doctor who is notorious for writing these reports." (Motion hearing transcript p. 9).

In this case, as in any dispute over a worker's physical condition, different physicians performed examinations and/or read reports and reached different conclusions as to Plaintiff's medical condition. Dr. Ray was one of six physicians (two for the plaintiff and four for the defendants) whose evidence the worker's compensation magistrate considered, along with sworn deposition testimony. There is, in short, nothing at all that distinguishes this case from any other worker's compensation dispute over a worker's physical condition.

The award of sanctions in the district court by the magistrate under 28 U.S.C. § 1927 is a reflection of the fact that this case is actually a "strike suit," in which a litigant who has lost a decision in a state court invokes RICO as a means of retaliation against the opposing party for offering evidence which the RICO plaintiff did not like, and a means of retaliation against the witness for offering an unfavorable opinion. An inherent part of the judicial process is the offering of conflicting opinions. Allowing a RICO case to proceed by labeling as "fraud" both the assertion of a claim cognizable under state law (that Petitioner's disability had ended) and the offering of evidence to support that claim, does violence both to the purposes of RICO and to state adjudicative proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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